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No. 84-648

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

SEDIMA, S.P.R.L.,
Petitioner,
v.
IMREX COMPANY, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND PROPOSED BRIEF

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The American Institute of Certified Public Accountants respectfully moves, pursuant to Supreme Court Rule 36.3, for leave to file a brief as *amicus curiae* urging that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit. Although counsel for respondents has consented to the filing of the proposed brief, counsel for petitioner has declined to consent.

The Institute is the only national accounting association whose membership is limited to certified public accountants. The Institute has approximately 230,000 members, many of whom are regularly engaged as outside

accountants to conduct independent audits of the financial statements of business enterprises.

The Institute believes that the Second Circuit has correctly interpreted the civil RICO statute to focus the statute in the way Congress intended. Decisions by other courts, however, have allowed private plaintiffs to bring RICO charges against legitimate businesses, based on allegations that have nothing to do with the statute's intended target: organized crime.

Lower court decisions that, contrary to Congress's intention, have permitted plaintiffs to use civil RICO against legitimate business people — by threatening them with treble damages and accusing them of being "racketeers" — have fostered a severe "danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). The danger results from the reality that "a plaintiff with a largely groundless claim" can "simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value" of the lawsuit. *Id.* at 741.

Unfortunately, accountants and their firms have become one of the favorite "targets of opportunity" in civil RICO cases. When auditors express opinions on financial statements, they become exposed to suits brought by investors, creditors, and others who may claim to have relied upon those statements in making investment decisions or entering into business transactions with the auditors' clients. When corporations become insolvent, outside professionals such as accounting firms are frequently the only "deep pocket" defendants available. Although claimants often allege that outside professionals were implicated in a "scheme to defraud," these suits generally manifest the attitude that, as one class action attorney put it, "someone has

to pay" when a person "invests in a company that goes sour." Wall St. J., Jan. 28, 1985, at 30, col. 1. Members of the Institute, therefore, along with other professionals and legitimate businessmen, have a vital interest in urging this Court to adopt an interpretation of RICO that not only will dispose of the case before the Court but will do so in a manner that will bring some consistency and coherence to this misused area of the law.

The participation of the Institute is particularly important because it intends to devote its brief to supporting the Second Circuit's conclusion that a claimant may only bring a civil RICO suit against a person who has been convicted of the specified crimes listed in the statute. The respondents did not argue this position in the courts below, and we understand that no other *amicus* intends to address this ruling in any detail. In addition, the respondents and the other *amici* supporting the judgment argue that the special type of injury that a plaintiff must allege and prove under civil RICO is "racketeering injury." The Institute urges a different formulation of the proper inquiry: "competitive injury."

For these reasons, we request that the Court authorize the Institute to file the annexed brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

As explained more fully in the accompanying Motion, the Institute has a particular interest in addressing the issues raised by this case. Accounting firms are often among the few "deep pockets" available in securities litigation. As a result they have become frequent targets of the increasing use of civil RICO to convert ordinary commercial and securities disputes into treble damage RICO cases. The Institute, therefore, has a special interest in urging this Court to adopt an interpretation of RICO that returns civil RICO to its intended uses, as the decision below does.

SUMMARY OF ARGUMENT

I.

A. Since RICO repeatedly refers to criminal acts as the predicates for both criminal and civil liability, the Second Circuit reasonably concluded that the statute only provides a civil remedy against persons whose multiple prior convictions make it fair to treat them as part of "organized crime." The origins and legislative history of RICO confirm that interpretation. Both the Kefauver Committee in the early 1950's and the Katzenbach Commission in the late 1970's urged Congress to strengthen the Executive Branch's law enforcement weapons to fight organized crime; neither body suggested that private lawsuits were part of the solution to the problem. Congress chose to confer broad authority upon the Executive Branch, with the expectation that the Department of Justice would channel this broad authority into a precisely-targeted law enforcement program directed at "organized crime."

B. Congress could not have intended to allow private litigants to invoke RICO without the kind of prosecutorial screening that was to be the essential mechanism for applying the statute to its intended targets. Nowhere does the legislative history suggest any intent to commission "private attorneys general." Congress understood and intended that treble damage liability would simply be another sanction visited on those members of organized crime who had been identified by public prosecutors and convicted of racketeering offenses, not a substitute for prosecution and conviction.

C. Reading civil RICO claims as dependent on a prior conviction is, as the court below recognized, the only way to be faithful to the paramount congressional goal of *protecting* legitimate business people. In the circuits that have ignored this limiting principle, private RICO suits

have not been directed at the incursions of organized crime, but at the commercial practices of the legitimate business people whom RICO was enacted to protect. Without the prior-conviction requirement, RICO would unwittingly create federal jurisdiction over, and treble damages awards for, virtually any kind of commercial or financial dispute, even one otherwise governed wholly by state law.

D. Any other interpretation of civil RICO, moreover, would raise serious doubts as to its constitutionality. RICO is unique among federal statutes because it explicitly makes the prior commission of specific crimes an essential element of civil liability. Under the Constitution, the decision to lodge an accusation of crime is the exclusive province of responsible Executive Branch officials. Only the clearest statutory language or legislative history should lead the Court to conclude that Congress intended to disregard this tradition embedded in the Constitution, but the language and history of RICO actually support the opposite conclusion.

II.

A. The language of civil RICO and the concerns expressed by its congressional sponsors evince a clear intention to create a new remedy only for one type of injury: the injury suffered by a legitimate competitor when organized crime infiltrates a business. Congress understood that the direct victims of the crimes included as RICO predicate offenses already had adequate state and federal remedies; civil RICO was designed solely to assure that the victim of racketeering competition also has a personal right to redress.

B. Congress chose to separate the RICO civil remedy from the antitrust laws simply because it did not want antitrust doctrine — especially the principle that the antitrust

laws protect "competition not competitors" — transplanted wholesale into the RICO context.

ARGUMENT

I. CONGRESS INTENDED TO ALLOW CIVIL RICO ACTIONS ONLY AGAINST PERSONS CONVICTED OF "RACKETEERING" ACTS.

RICO is one of eleven titles of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). The other titles reflect the criminal law enforcement orientation of the statute as a whole. *See, e.g.*, 18 U.S.C. §§ 6001 *et seq.* and § 1826 (use immunity); § 3503 (pre-trial depositions in criminal cases); § 3504 (limiting motions to suppress); §§ 3575 *et seq.* (increased sentences for "dangerous special offenders"). The language of RICO (Title IX) similarly emphasizes the congressional focus on prosecuting hard-core criminals. Since the RICO title repeatedly refers to criminal acts as the predicates for both criminal and civil liability, the court below reasonably concluded that, even on the face of the statute, Congress manifested its intent to focus the new civil remedy only on persons whose multiple prior convictions identify them as part of "organized crime."

Moreover, beyond the language of the statute, the Court should "look to the objectives Congress sought to achieve. . . . " *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 111 (1982). The Second Circuit believed that the legislative history "gives little hint of the intended scope of private action under civil RICO." 741 F.2d at 488. The Seventh Circuit, in the companion case now before the Court, disagreed with the Second Circuit's result because it viewed the legislative history as indicating that "Congress

deliberately chose the very broad language of RICO's provisions." *Haroco* v. *American National Bank & Trust Co.*, 747 F.2d 384, 390 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (Jan. 15, 1985). Both courts, however, misperceived the legislative history that illuminates Congress's limited intent in providing the *private* remedy. The Seventh Circuit, like some other courts that have felt constrained to accord civil RICO an expansive sweep, mistakenly seized on comments about the need to give public prosecutors broad criminal enforcement powers; it erroneously assumed that Congress intended to delegate equally open-ended discretion to private claimants. In fact, however, Congress intended that the private civil remedy would play a much more modest — indeed, incidental — role under the statute. The legislative history confirms the soundness of the result that the Second Circuit reached on the basis of textual exegesis.

A. Congress Intended That the Executive Branch Would Insure That RICO's Broad Authority To Attack "Organized Crime" Is Precisely Targeted.

Congressional concern about organized crime came alive in the 1950's when the special Senate committee chaired by Senator Estes Kefauver held hearings and issued a report on organized crime. *See* S. Rep. No. 307, 82d Cong., 1st Sess. (1951). Nearly two decades later, the President's Commission on Law Enforcement and Administration of Justice, chaired by Attorney General Katzenbach, renewed the alarm. Both the Kefauver Committee and the Katzenbach Commission recommended that Congress strengthen law enforcement weapons to deal with organized crime. Significantly, however, neither body suggested that private lawsuits were part of the solution to the problem.

The Kefauver Committee recommended additional crime legislation and prosecutorial action at the federal and

state levels. *See* S. Rep. No. 725, 82d Cong., lst Sess. 6-11 (1951). The Katzenbach Commission recommended "a national strategy against organized crime," which was to consist of specific changes in the system of criminal justice, including expanded grand jury powers, a general witness immunity statute, legislation authorizing electronic surveillance, longer sentences for participating in a "continuing illegal business," and protection for witnesses in organized crime cases.[1]

The Katzenbach Commission report spurred enactment of two multi-faceted law enforcement measures, the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968), and the Organized Crime Control Act of 1970, *supra*. The 1968 statute authorized electronic surveillance; the 1970 statute addressed most of the Commission's other recommendations.

Some of the legislative proposals that immediately followed the Katzenbach report attempted to define and outlaw "organized crime". For example, in the 90th Congress, Senator John McClellan (author of the bills that were eventually combined to form the Organized Crime Control Act of 1970) introduced S. 678, 90th Cong., 1st Sess. (1967), a bill to "outlaw the Mafia and other organized crime syndicates." The bill would have made it a crime to become a member of "the Mafia" or "any other organization" having as one of its purposes the violation of the criminal laws "relating to gambling, extortion, blackmail, narcotics, prostitution, or labor-racketeering."

Congress, however, did *not* follow that approach in drafting the Organized Crime Control Act of 1970, since it was concerned that any attempt to define "organized crime" might unconstitutionally create a "status" crime. *See, e.g.,*

1. President's Commission on Law Enforcement and Administration of Justice, *The Challenge Of Crime In A Free Society* 190, 200-204 (1967).

116 Cong. Rec. 35,343 (remarks of Rep. Celler); *id.* 35,344 (remarks of Rep. Poff) (1970). Instead, Congress conferred broad authority upon the Executive Branch to exercise discretion to identify and prosecute racketeers. Congress defined the term "racketeering activity" to include a long list of federal and state crimes as diverse as murder, kidnapping, arson, and mail fraud. *See* 18 U.S.C. § 1961(1). The list of what could be branded as "racketeering activity" was made quite broad, because, as Senator McClellan observed, organized crime had shown great flexibility in branching into additional illegal activities, and "if we name one crime, they will commit another." Narrowing the list, it was feared, would only create a "loophole" into which organized crime would move. Congress, the Senator explained, could not "anticipate everything"; it would "have to make a statute general." 116 Cong. Rec. 845-46 (1970).

Nevertheless, Congress expected the Department of Justice to channel this broad authority into a precisely-targeted law enforcement program directed at "organized crime," as experienced prosecutors understand that concept. This point was made, for example, in a colloquy between Senator McClellan and the Deputy Staff Director of the Katzenbach Commission, Henry Ruth:

> "Senator McClellan: . . . I note that you say that while S. 30 is aimed at organized crime it has a general application to the criminal justice system. Do you think there is any practical way in which we can limit its application to organized crime?
>
> "Mr. Ruth: Legislatively no, sir; *I think, administratively you can.* The difficulty is in drawing up the statutes aimed at organized crime, as you are probably aware of, as much as anyone in the country — you have drafted statutes in the past trying to define organized

crime as a crime — and it has been very difficult on a constitutional basis." (Emphasis added.)[2]

Similarly, the former Chief of the Organized Crime and Racketeering Section of the Justice Department's Criminal Division, William Hundley, testified that the authority being conferred was "very broad" and would have to be "very selectively used." When Senator McClellan asked, "How could you write into the statute a provision that would compel this sort of selective use?", Hundley responded, "I don't think there's any way. *I think you're going to have to rely on the Justice Department.*" Senate Hearings 424 (emphasis added).

Thus, Congress chose an approach that is familiar in crime legislation: entrusting broad statutory authority to Executive Branch discretion. Senator McClellan himself later explained that prosecutorial screening was the key to assuring that the broad new authority would only be used against "organized crime" figures. *See* McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law. 55, 144 (1970).

The Justice Department has implemented the congressional design by promulgating rules to insure that the broad authority that Congress conferred is used only against career criminals — members of "organized crime" as experienced prosecutors recognize them. The overriding policy set forth in the Justice Department "RICO Guidelines," incorporated in the *United States Attorneys' Manual*, §§ 9-110.200 through 9-110.413, is that RICO is to be used "selectively" and that "not every case in which technically the elements of a RICO violation exist will result in the

2. *Measures Relating To Organized Crime: Hearings Before the Subcomm. on Criminal Laws And Procedures of the Senate Comm. on The Judiciary*, 91st Cong., 1st Sess. 346-47 (1969) ["Senate Hearings"]. The provisions in S. 30 being discussed were the RICO provisions that the Senate Judiciary Committee eventually reported out as part of the Organized Crime Control Act.

approval of a RICO charge." *United States Attorneys' Manual*, § 9-110.200 at 9 (March 9, 1984).

The Justice Department's responsibility to exercise expert discretion has played a major role in the broad interpretations of RICO that the Department has sought and received from the courts. For example, when this Court was considering *United States* v. *Turkette*, 452 U.S. 576 (1981), the Department assured the Court that no "extreme cases" would be brought under RICO, because the Department would exercise "sound discretion" through the Criminal Division's centralized review process. *See* Brief for the United States at 25 n.20.

B. Congress Intended Private RICO Claims To Be Incidental To Government Prosecutions.

Neither the Kefauver Committee, nor the Katzenbach Commission, nor the sponsors of the 1970 Organized Crime Control Act viewed private lawsuits as an important additional weapon against organized crime. Rather, the basic congressional plan was to delegate to experienced prosecutors the responsibility for selecting appropriate targets for criminal RICO enforcement. Congress, therefore, could not have intended to allow private litigants to invoke RICO without the kind of prosecutorial screening that was to be the essential mechanism for applying the statute to its intended targets. That is why absolutely no voice was heard in Congress to suggest that a private plaintiff might be able to dress up a securities case, a product liability suit, or a common law commercial dispute and have it masquerade as a RICO "racketeering" claim.

1. RICO as passed by the Senate authorized only government enforcement.

RICO first passed the Senate in 1970 as part of S. 30, 91st Cong., 2d Sess. (1970), sponsored by Senator McClellan, the chairman of the Senate Judiciary Committee, which

reported the bill. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 83 (1970) ["Senate Report"]. In contrast to some other anti-racketeering proposals, the McClellan bill authorized only government enforcement and made no provision for private remedies. *See* 116 Cong. Rec. 972 (1970). The only civil remedies were injunctions that the Justice Department alone could seek.

The omission of private remedies was no accident. Another bill, S. 1623, 91st Cong., 1st Sess. (1969), introduced by Senator Hruska, had included proposals to authorize private suits against racketeers. Indeed, petitioner and their *amici* emphasize Senator Hruska's explanation of the relative importance of civil remedies under *his* bill (Pet. Br. 17; Arizona Amicus Br. 9 n.14). They neglect, however, to point out that neither the Judiciary Committee nor the Senate accepted Senator Hruska's approach. Instead, as the Senate Report explained, the bill actually reported and passed "was the product" of "careful efforts" to cull the basic elements from various proposals. Senate Report 83. The RICO provisions adopted by the committee originated in S. 1861, 91st Cong., 1st Sess. (1969), which Senator McClellan had sponsored; unlike S. 1623, it did not authorize any private remedies. The bill as marked up and reported, S. 30, thus contained no provision at all for private enforcement.[3]

Moreover, even the government's civil remedies under S. 30 were to supplement rather than displace criminal prosecutions. The proposed section on "civil remedies" contained language providing that a criminal conviction would "estop" the defendant "in any subsequent civil proceeding

3. A comparison of the two bills, reprinted at Appendix B (S. 1623) and Appendix C (S. 30), *infra*, shows that Senator Hruska's approach was primarily to create a new civil remedy where none existed, whereas the Senate bill relied exclusively on public enforcement through criminal, injunctive, and forfeiture proceedings.

brought by the United States" (proposed § 1964(c)). Senator McClellan explained that it was not enough merely to prosecute, convict and "imprison individual mob members." 116 Cong. Rec. 591 (1970). Instead, the "civil remedies" were to bring about "wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains." *Id.* Thus, civil remedies were not to supplant criminal prosecution; they were to be available if the prosecutors concluded that a sanction *beyond* conviction was appropriate.

The Senate debates on the organized crime bill recognized that organized crime victimizes many Americans. *See, e.g.*, 116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska); *id.* 585-86 (1970) (remarks of Sen. McClellan); 115 Cong. Rec. 17,504 (1969) (remarks of Sen. McClellan); *id.* 36,988 (1969) (remarks of Sen. Scott). Yet, the Senate proposed to aid the victims of organized crime, not by authorizing a flood of private litigation, but by giving law enforcement authorities powerful new resources to discharge *their* responsibility for leading the fight against organized crime.

2. When the House added a private treble damage remedy, it did not intend to deputize "private attorneys general" to act where prosecutors had not.

The House Judiciary Committee, after hearings, reported the Senate-passed bill with a number of amendments. The dominant theme of the committee's action was to refine rather than to enlarge the Senate bill:

> "The Committee's principal aim has been to eliminate provisions vulnerable to constitutional objections and to revise sections deemed to be unworkable so that the legislation will withstand future court challenge." H.R.

> Rep. No. 1549, 91st Cong. 2d Sess. 32 (1970) ["House Report"].

The House committee made only one change to the "civil remedies" section of the RICO title; it added the language now found in § 1964(c) authorizing private treble damage suits. Vividly illustrating its view that this addition did not alter the essential nature of the bill, the committee's report devoted only a single, bland sentence to the new provision:

> "The title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured." House Report 35.

In the House debates that led to passage of the bill as reported, the Members gave scant attention to this aspect of the bill. Instead, the debate was dominated by controversy over the breadth of the enforcement powers being conferred upon the government, not only in Title IX but in other provisions as well. *See generally* 116 Cong. Rec. 35,191-217, 35,287-363 (1970).

Although some courts and commentators have characterized the private RICO remedy as authorizing "private attorneys general" to supplement prosecutorial enforcement, nowhere in the legislative history did any Member of Congress advert to such an intent. Congress evidently did not believe that *autonomous* private enforcement was either necessary or realistic. Indeed, as subsequent history has dramatically illustrated, Congress would have been remarkably naive to have believed that a private citizen would have the temerity to move against a real organized crime figure *unless* the government had first prosecuted and convicted him. Instead, the limited purpose of adding a private remedy was to provide direct, personal financial relief for certain victims of organized crime whose interests the government did not fully redress *merely* by indicting and convicting the

racketeers. This sharply-defined focus emerges from the structure of the final bill.

First, the House-amended version added the civil RICO provision to Title 18 of the United States Code, which had never authorized independent private actions to enforce its general criminal prohibitions. The RICO treble damage provision was not codified in Title 15 or elsewhere, as a true "private attorney general" statute might have been.

Second, although the House added a private treble damage remedy, it did not adopt any of the related pending proposals that would have created mechanisms for independent private suits. The House committee considered S. 1623, Senator Hruska's original bill, and its companion House bill, H.R. 9327, 91st Cong., 1st Sess. (1969), which had been introduced on the same day by Representative Poff, one of the ranking minority members of the House Judiciary Committee. Those bills (*see* App. B, *infra*) not only contained provisions authorizing private treble damage actions but also included elaborate machinery for private enforcement. Significantly, the House Judiciary Committee tagged onto the criminal RICO title *only* the bare language creating a private treble damage action, and not the other proposals for free-standing private enforcement.

Third, when the House debated the amended bill, both the bill as a whole and its RICO title were viewed as a criminal law enforcement measure. Absent from the House report or the House debates was any notion that the new version of the bill had revolutionized the enforcement plan and allowed private claimants to identify "organized crime" targets by bringing civil suits unharnessed to a government prosecution. Even though the role of the "private attorney general" under the antitrust laws was well established by that time, no one characterized the private RICO remedy in that way.

Instead, criminal prosecutions directed by experienced Justice Department prosecutors remained the core of the bill. Thus, the Judiciary Committee Chairman, Representative Celler, described the bill as intended "to curb organized crime by strengthening the Federal criminal justice system." 116 Cong. Rec. 35,196 (1970). And Representative St. Germain described how the bill would be applied to its intended targets: "law enforcement officials know who the racket leaders are . . . ." 116 Cong. Rec. 35,200 (1970). Members of Congress, therefore, must have understood that private damage actions would be brought only against persons whom law enforcement officials had identified, prosecuted and convicted of the racketeering acts listed in the statute.[4]

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4. Petitioner (Pet. Br. 17) and its *amici* rely on the unsupported comment by Rep. Mikva, 116 Cong. Rec. 35,342 (1970), that "there need not be a conviction under any of these laws for it to be racketeering." Rep. Mikva, however, was opposed to any private civil remedies under this bill and his comments do not reflect congressional intent. When he included this assertion in his list of reasons for opposing the provision, no one saw fit to comment on it. Indeed, Rep. Mikva's remarks were made to a virtually empty chamber, as the vote on his amendment, taken immediately after his statement, demonstrates. *See* 116 Cong. Rec. 35,343 (only 67 votes cast). In contrast, when the House voted to approve the bill later in the day, 367 representatives participated. *Id.* at 35,363. Thus, not only should Rep. Mikva's comments be discounted because he was an avowed critic of the private remedy provision, *see* 741 F.2d 490 n.22, but the remarks were delivered without even a quorum of the House present, and the final vote was taken before his remarks were even published, let alone read.

Furthermore, Rep. Steiger, who had urged the House Judiciary Committee to include a treble damage remedy, had commented to the House that under the bill as reported the "relationship between proceedings brought by the United States and proceedings brought by private plaintiffs" was a "complex and subtle" matter. 116 Cong. Rec. 35,227 (1970). His statement was far more equivocal than that of Rep. Mikva. Rep. Steiger had recommended a package that would have expanded civil remedies for both the government and private persons (such as treble damage actions by the United States and equitable remedies for private persons). *Organized Crime Control: Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520-21 (1970) ["House Hearings"]. The Judiciary Committee, however, did not incorporate this package. When he offered the package again as a floor amendment, Rep. Poff persuaded him to withdraw it for possible consideration by a later Congress. 116 Cong. Rec. 35,346-35,347 (1970).

Finally, when the House-amended bill returned to the Senate, Senator McClellan, after examining it "with some care," characterized the House amendments as "minor changes" and moved that the Senate immediately agree to them. 116 Cong. Rec. 36,293 (1970). The Senate promptly adopted the House version. 116 Cong. Rec. 36,296 (1970).

Thus, Congress understood and intended that treble damage liability would simply be another sanction visited on those members of organized crime whom public prosecutors have identified and have convicted on racketeering offenses, not a *substitute* for prosecution and conviction. If members of Congress had contemplated a broader, "private attorney general" role for private plaintiffs, they surely would have addressed this concept specifically. They also would have examined the potential effect of eclipsing other federal and state causes of action and bringing a large volume of new litigation into the federal courts. This Court should not assume that Congress's failure to consider all those consequences was merely short-sighted, as some lower courts have suggested, but should infer that Congress understood that the private civil RICO remedy would come into play only after the government has selected appropriate "organized crime" targets. *Cf. Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 377 (1982) (explaining that the Court has become less willing to assume Congress intended to create new private rights of action, because "the increased volume of federal litigation strongly support[s] the desirability of more careful scrutiny of legislative intent").

C. Unless The Statute Is Interpreted As The Second Circuit Did, Private RICO Actions Will Continue To Be Misused To Cause Consequences Never Intended By Congress.

As this Court has recognized, "the major purpose" behind RICO was "to address the infiltration of legitimate

business by organized crime," a point that was "made time and again during the debates and in the hearings before the House and Senate." *United States* v. *Turkette*, *supra*, 452 U.S. at 591. Today, however, private plaintiffs in most circuits have twisted RICO to pursue objectives completely contrary to the congressional goals. Private RICO suits have been directed, not at infiltration by organized crime, but mainly at the commercial practices of the legitimate business people that RICO was enacted to protect. This phenomenon has been accompanied by an attempt to secure federal jurisdiction over, and treble damages awards for, virtually any kind of financial dispute, even one otherwise governed wholly by state law. Reading civil RICO claims as dependent on a prior conviction is, as the court below recognized, the only way to be faithful to the overarching congressional goal of *protecting* legitimate business people.

1. Almost all private RICO actions have been brought against legitimate business, the intended beneficiary of RICO.

Of the reported private RICO cases, there have been only a few involving the kind of law enforcement problem at which RICO was aimed. For instance, in *Anderson* v. *Janovich*, 543 F. Supp. 1124 (W.D. Wash. 1982), a tavern owner alleged that competitors had tried to control the local tavern business through threats of murder and arson. In *Anderson*, however, as in virtually all of the other civil RICO suits against violent criminals, the private suit *followed* criminal prosecution and conviction, as Congress had assumed. *See also State Farm Fire and Casualty Co.* v. *Estate of Caton*, 540 F. Supp. 673 (N.D. Ind. 1982) (arson fraud); *Milwaukee* v. *Hansen*, 77-C-246 (E.D. Wis. Jan. 13, 1981) (arson).

By far the vast majority of private RICO actions, though, have attacked legitimate businesses, under circumstances that would not lead a public official even to consider

filing a criminal charge. Instead, the plaintiffs raise the stakes in commercial disputes by alleging that the defendants' business activities involved a "scheme to defraud" in violation of the securities or mail fraud statutes, thereby manufacturing a RICO case. The recent report of a special American Bar Association Task Force appointed to study civil RICO illustrates the use of RICO to transmogrify business tort and contract cases. The task force comprehensively surveyed reported and unreported civil RICO cases and classified the essential allegations as follows:

Percentage	Underlying Allegation
40%	securities fraud
37%	common law fraud in a commercial setting
4%	antitrust or unfair competition
4%	bribery or commercial bribery
3%	other fraud
2%	labor disputes
1%	theft or conversion
9%	offenses generally associated with professional criminal activity

See Report of ABA Special Task Force on Civil RICO 53-54 (1985).

As the figures suggest, these suits are not directed at gangsters and racketeers. The most extensive use of private RICO has been in disputes involving securities trading, such as disputes between a broker-dealer and a customer, and in actions alleging false statements or nondisclosures in SEC filings or public announcements.[5] RICO allegations are now

5. *See, e.g.*, *Schacht* v. *Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508 (1983); *In re Data Access Systems Securities Litigation* 1 RICO Lit. Rep. 641 (D.N.J. 1984); *Harper* v. *New Japan Securities International, Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982); *Noland* v. *Gurley*, 566 F. Supp. 210 (D. Colo. 1983).

also becoming an accepted tactic in tender-offer litigation.[6] RICO allegations are thus being used to overcome the "carefully crafted" limitations that govern the express and implied remedies under the federal securities laws. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195, 206-211 (1976). RICO allegations also appear in other commercial contexts, such as suits against banks over the correct rate of interest, and disputes in commercial real estate transactions.[7]

Private claimants, in sum, have used civil RICO to charge dozens of investment banking and brokerage firms, national accounting firms, banks, law firms, insurance companies, and manufacturing companies with engaging in "patterns of racketeering" in violation of this "organized crime" statute. (Many of these institutions are listed in Appendix A, *infra*.) Thus, civil RICO has become, in some circuits, "the ultimate weapon in business and commercial litigation." ABA Section of Litigation, *RICO: The Ultimate Weapon In Business and Commercial Litigation* (1983).

2. RICO has been used to "federalize" state common law torts and commercial disputes.

The use of RICO by private plaintiffs to attack legitimate business not only burdens the respected institutions that must defend charges of racketeering; it also burdens the federal courts. Virtually any dispute today arises from a background of events in which the mail or the telephone was used. By invoking the mail fraud or wire fraud predicates of

6. *See, e.g., Dan River, Inc.* v. *Icahn*, 701 F.2d 278 (4th Cir. 1983); *Gearhart* v. *Smith International Inc.*, 592 F. Supp. 203 (N.D. Tex.), *modified*, 741 F.2d 707 (5th Cir. 1984).

7. *See, e.g., Morosani* v. *First National Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983); *Battlefield Builders, Inc.* v. *Swango*, 743 F.2d 1060 (4th Cir. 1984).

RICO, private plaintiffs are able to invoke federal jurisdiction over disputes that have been the exclusive province of the state courts.[8]

The need to allege "fraud" presents no real obstacle. In affording the government wide latitude to prosecute under the mail fraud statute, the lower federal courts have indicated that the statute "condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Blachly* v. *United States*, 380 F.2d 665, 671 (6th Cir. 1967) (quoting *Gregory* v. *United States*, 253 F.2d 104, 109 (5th Cir. 1958)).[9] Hardly a commercial dispute exists in today's world in which one side does not believe that the other failed to engage in "fair play and right dealing." At the very least, allegations of this sort survive preliminary dismissal motions and thus set the stage for coerced settlements. In the circuits that allow plaintiffs to pursue civil RICO claims against persons who have never been convicted of crimes, therefore, litigious

8. For example, in *Maxwell* v. *Southwest National Bank*, 1 RICO Lit. Rep. 612 (D. Kan. 1984), a private RICO plaintiff is alleging that the defendants committed mail and wire fraud to deprive him of his inheritance. Similarly in *Erlbaum* v. *Erlbaum*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. July 13, 1982), the RICO claim was based upon allegedly fraudulent correspondence between estranged spouses "during negotiation of a property settlement." Personal injury claimants have alleged mail fraud for "RICO-ized" products liability actions, *see In re Dalkon Shield Litigation*, 1 RICO Lit. Rep. 629 (S.D. Ohio 1984), and complaints alleging wrongful discharge from employment have been filed as RICO actions. *Callan* v. *State Chemical Mfg. Co.*, 584 F. Supp. 619 (E.D. Pa. 1984).

9. To the same effect, *see, e.g., United States* v. *Curry*, 681 F.2d 406, 410 (5th Cir. 1982). *See also* Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 149 (1981).

plaintiffs encounter few constraints in urging that their grievances fall within an elastic concept of "fraud."[10]

The advocates of using civil RICO in ordinary commercial disputes assert that Congress recognized that the fraud-based predicates would have a broad impact on civil litigation. There is, however, not a shred of support for this argument; all of the references to RICO's breadth dealt with its *criminal* provisions. There was simply no discussion of possible overlap with existing federal *civil* remedies or the possible "federalization" of local civil disputes as a result of including various fraud predicates, and certainly no intent to achieve those consequences. The Senate added securities, wire, and mail fraud to the bill's list of predicates at the suggestion of the SEC's Division of Enforcement because organized crime figures had begun to engage in market manipulation and securities theft. The SEC officials recommended the changes when they understood the legislation would provide for only government, not private, remedies. They believed that RICO could serve as an important weapon for *government* enforcement against those activities. *See* ABA Civil RICO Task Force Report, *supra*, at 97-98 n.130. When the House later added the private civil remedy, no one suggested that the fraud predicates were intended either to be superimposed on other private remedies for fraud or to federalize local commercial disputes.

10. The mail fraud and wire fraud statutes are not the only bases upon which private plaintiffs have used RICO to federalize local disputes. Recently, the Fourth Circuit reinstated a RICO treble damage action brought by a condominium developer who alleged that purchasers of an office condominium unit were trying to "extort" an unreasonably high price in connection with his effort to repurchase the condominium unit in order to include it in a block of units the developer wanted to sell to IBM. *See Battlefield Builders, Inc.* v. *Swango*, *supra*, 743 F.2d 1060.

D. Since Public Prosecutors Have Exclusive Constitutional Discretion To Accuse A Person Of A Crime, Civil RICO Must Be Interpreted As Requiring That The Criminal "Racketeering" Element Rest On A Prior Conviction.

Under the Constitution, the decision to lodge an accusation of crime is the exclusive province of responsible Executive Branch officials. There would be serious doubts about RICO's constitutionality, therefore, if RICO authorized private plaintiffs to invite federal courts and juries to find that persons had committed crimes with which public prosecutors had not successfully charged them. Since a court is to interpret a statute in a way that avoids "a serious doubt of constitutionality," *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979), this Court should construe civil RICO as making a prior conviction a prerequisite to a private civil RICO suit.

When other federal statutes provide both criminal penalties and private civil remedies, guilt of a crime is not an essential element of the civil claim. Of course, the same conduct may give rise to both criminal and civil exposure, but under statutes other than RICO a plaintiff need not allege and prove the actual commission of a crime in order to show his right to civil redress. *See generally* W. Prosser & P. Keeton, *Torts* 7-9 (5th ed. 1984). The federal antitrust laws, to which RICO is sometimes analogized, illustrate this distinction. Civil liability may rest on the same *conduct* that also may give rise to criminal exposure, but nothing in the antitrust laws makes the defendant's commission of a crime a specific and essential element of a civil claim.[11]

11. The standards for criminal and civil liability under the antitrust laws actually differ, even though both claims rest on the same statute. *Compare United States* v. *United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978), *with American Society of Mechanical Engineers, Inc.* v. *Hydro-level Corp.*, 456 U.S. 556, 565-74 (1982). *See* 2 P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 310 (1978).

RICO, by contrast, is unique among federal statutes because it explicitly makes the prior commission of specific crimes an essential element of civil liability. As the Seventh Circuit itself acknowledged in the companion case, "RICO liability must be based, after all, on findings of criminal conduct." *Haroco* v. *American National Bank* , *supra*, 747 F.2d at 404. Petitioner, therefore, simply misses the point in asserting (Pet. 27) that Congress "has used the statutory scheme of civil proceedings *in the context* of criminal statutes with regularity" (emphasis added).[12]

Congress, of course, has great flexibility in deciding whether to authorize the government to attack misconduct with civil or criminal remedies, or both.[13] The issue here, however, is not whether Congress may subject misconduct to both criminal and civil sanctions or whether it may authorize the Department of Justice to choose between alternative methods of enforcement. Rather, the issue is whether Congress may transfer to private claimants the power to press explicit charges of criminal conduct that no public prosecutor has decided to level.

The Constitution does not permit Congress to delegate that power to private claimants. Under Article II of the Constitution, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case. . . . " *United States* v. *Nixon*, 418 U.S. 683, 693

12. Amicus knows of no other federal statutes in which civil remedies are predicated on alleging and proving that the defendant committed a crime. The one "example" cited by petitioner (Pet. 27) is a recent amendment to the Lanham Act, but Section 1503(2) of P.L. 98-473, from which the petitioner quotes, merely sets treble damages as the remedy for infringement of the Act's civil provisions, without regard to possible criminal violations. *See* 15 U.S.C. § ..14(1).

13. *See, e.g., United States* v. *Ward*, 448 U.S. 242 (1980); *In re Debs*, 158 U.S. 564 (1895); *United States* v. *Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (upholding government's civil RICO remedies).

(1974). Since the constitutional separation of powers assigns exclusively to executive officials the "discretionary power" to decide "whether a prosecution shall be commenced or maintained," neither private persons nor the federal courts themselves may charge a person with a crime that a prosecutor has not alleged. *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.) (*en banc*), *cert. denied*, 381 U.S. 935 (1965). As the court held in *Cox*, there simply can be no charge of crime in a federal court, even by a grand jury, unless the Executive Branch affirmatively decides to initiate and press it. *See, e.g., Mariscal* v. *United States*, 449 U.S. 405 (1981).

The government's exclusive control over criminal charges is a hallmark of our notion of fundamental fairness. As this Court has explained, a public prosecutor, unlike a private lawyer representing a private client, is not the representative "of an ordinary party to a controversy" but is "the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976). The ABA Standards for Criminal Justice, therefore, explicitly state that "the prosecution function should be performed by a public prosecutor. . . . " Standard 3-2.1, I *ABA Standards For Criminal Justice* (2d ed. 1980) at 3.12. The "participation of a responsible public officer" who is accountable for his judgments "gives greater assurance that the rights of the accused will be respected" when the momentous decision is made to accuse a person of crime. *Id.* (commentary).

Serious abuses are actually occurring in circuits that allow private RICO plaintiffs to accuse defendants of crimes when they have not been convicted of anything. Prosecutors

would rarely find any prosecutive merit in these accusations. As one survey of private civil RICO cases concluded:

> "[R]ealistically speaking, the likelihood of state or federal prosecutors seeking indictments in the vast majority of these types of cases is as close to zero as anything could be." Weissman, *Circuit Aims to Curb Private Civil RICO Actions*, Legal Times, Aug. 20, 1984, at 12.

Some of RICO's predicate offenses are so broad that they presuppose the exercise of prosecutorial discretion. For instance, the mail fraud statute's enforcement of public notions of "moral uprightness" and "fair play," *see Blachly* v. *United States*, *supra*, 380 F.2d at 671, is too sweeping a basis for a private accusation of crime if it is freed from "the constraints of prosecutorial discretion and guidelines which limit its application in the criminal sphere . . . ." Rakoff, *RICO Litigation Rep.* 206 (September 1984).[14]

This Court already has held that certain constitutional rights applicable in criminal cases also apply in quasi-civil cases "requiring the determination that the criminal law has been violated. . . . " *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 701 (1965) (forfeiture). Since RICO is "intended to impose a penalty only upon those who are significantly involved in a criminal enterprise," and only

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14. Apart from RICO, therefore, the federal courts have consistently refused to treat this "bare criminal statute" as implying a private civil right of action even for single damages. *E.g.*, *Ryan* v. *Ohio Edison Co.*, 611 F.2d 1170, 1178 (6th Cir. 1979).

In another context, the Court has decided that the danger of allowing private parties to enforce a broad criminal statute implied that Congress did not intend to give private parties the enforcement authority entrusted to public officials. *Compare United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29 (1963), where the Court held that § 3 of Robinson-Patman Act is not unconstitutionally vague for criminal enforcement purposes, *with Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 378-79 (1958), where the potential for abuse of that vague provision led the Court to infer that Congress did not intend to allow private enforcement. *See* 2 Areeda & Turner, *supra*, § 311b at 33 n.7.

"by reason of offences committed" by them, *cf. United States* v. *United States Coin and Currency*, 401 U.S. 715, 718, 721-22 (1971), the fact that a RICO treble-damage claim is formally a "civil" proceeding does not strip defendants of their constitutional right to prosecutorial screening and proof beyond a reasonable doubt before a federal court is asked to brand them as criminal racketeers. *Cf. In re Gault*, 387 U.S. 1, 49-56 (1967).

Only the clearest statutory language or legislative history should lead the Court to conclude that Congress intended to disregard the sound tradition, embedded in the Constitution, that public prosecutors have exclusive authority to charge a person with crime. The text of RICO does not require that troublesome conclusion, and the legislative history shows that Congress was actually striving to avoid any constitutional issues. *See*, *e.g.*, House Report 32; House Hearings 519 (remarks of Rep. Steiger). Therefore, the Court should avoid a serious constitutional question by construing civil RICO as applying only where there have been prior convictions on the predicate crimes.

II. THE ONLY TYPE OF INJURY THAT CONGRESS MADE ACTIONABLE UNDER CIVIL RICO IS INJURY FROM UNFAIR COMPETITIVE PRACTICES FOR WHICH NO EFFECTIVE REMEDY HAD PREVIOUSLY EXISTED.

A. Section 1964(c) Was Intended Only To Create A Remedy, Which Congress Thought Was Lacking, For Certain Unfair Competitive Practices.

When the House added the private treble damage remedy, it adopted the language from one of the sections of the Hruska bill, S. 1623. *Compare* 18 U.S.C. § 1964(c) *with*

section 4(a), App. B at 6a, *infra*. Senator Hruska's description of the people in the zone of intended protection, therefore, should be most persuasive in deciding what kind of injury was to be covered by the language that he drafted.[15]

In introducing his bill, Senator Hruska described its limited criminal provisions and then explained why he had added private civil remedies:

> "[T]he bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Antitrust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that Act. This bill fills that gap." 115 Cong. Rec. 6993 (1969).

Although his committee reported a bill without any private remedy, the committee shared his concern about the fate of competitors when racketeers, "using force and fear," attempt "to secure a monopoly" in a line of business (Senate Report 77):

> "When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can thus be effectively eliminated and customers can be effectively confined to sponsored suppliers." *Id.*

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15. The court below indicated that the House language was "taken from H.R. 19586." 741 F.2d at 488 n.18. That statement is incorrect, since H.R. 19586, 91st Cong., 2d Sess. (1970), was not introduced until October 6, 1970, nearly a week after the House Judiciary Committee had reported the organized crime bill on September 30, *see* H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970). Instead, the Committee drafters almost certainly went to Senator Hruska's original bill, S. 1623, or to H.R. 9327, the companion House bill introduced the same day by Rep. Poff, who was the Senator's "opposite number" as principal minority spokesman for the bill in the House Judiciary Committee. *See* 115 Cong. Rec. 7069 (1969).

When Representative Steiger urged the House Judiciary Committee to add private remedies to the Senate-passed bill, he, too, concentrated on the goal of "guarding the American principle of free competition in the market place." House Hearings 520.[16] Even Representative Mikva, the most vocal opponent of the private remedy, warned *only* that "the trouble with this provision is that a dangerous tool is given *to a competitor* who wants to go after somebody *who is competing* too vigorously against him. . . ." 116 Cong. Rec. 35,342 (1970) (emphasis added).

The language chosen by Congress in § 1964(c) expresses this clear intention to create a new remedy only for one type of injury: the injury suffered by a legitimate competitor when organized crime infiltrates a business. The treble damage provision redresses the injury that occurs "by reason of" a "violation" of RICO's proscriptive provision, § 1962. A "violation" of § 1962 occurs, in turn, only when organized crime uses a "pattern of racketeering activity" to generate investment in, acquire, or conduct the affairs of an "enterprise" in a way that injures a legitimate competitor. As Senator Hruska and others recognized, the existing antitrust laws were inadequate to cope with that injury because, under normal antitrust principles, those laws protect only "competition, not competitors." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Civil RICO assured the victim of racketeer competition a personal right to recover, even if the racketeer's tactics did not affect market-wide competitive conditions.

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16. This concern for the honest businessman injured by "unfair competition" from a racketeer reflected a theme that had concerned Congress for many years. Two decades earlier, the Kefauver Committee had concluded that organized crime uses violence and "unscrupulous and discriminatory business practices" to "eliminate competitors and to compel customers to take articles sold by the mobsters"; this tactic gives the racketeer "a considerable advantage over a more timid competitor and is one of the means whereby the racketeer can push such a competitor to the wall." S. Rep. No. 307, 82d Cong., 1st Sess. 170 (1951).

Some lower courts have concluded that RICO also applies to any injury caused by any act of "racketeering activity" as defined in § 1961(1), not simply the competitive injury caused by the confluence of elements contained in § 1962. The treble damage provision, however, by its terms applies only to injury occurring "by reason of a violation of § 1962," as opposed to injury caused by "racketeering activity" as defined in § 1961(1).

A simple hypothetical illustrates the difference. When a racketeer-infiltrated laundry drives law-abiding competitors out of business by making and carrying out threats of physical abuse against customers of the competing laundries, it violates § 1962(c); the people who have infiltrated the laundry have conducted its affairs "through a pattern of racketeering activity." The legitimate, competing businesses have been injured "by reason of the violation" of § 1962(c) and may sue under RICO for treble damages. The direct victims of the threats and physical abuse, by contrast, have been injured by the acts of racketeering themselves. They have available to them all of the private tort remedies, including punitive damages, that pre-dated RICO — remedies that Congress never suggested were inadequate. Quite simply, Congress did not create the new RICO treble damage for their benefit, since they already had ample avenues to pursue damage claims.

Furthermore, the treble damage provision only applies to injury to "business or property." This provision excludes recovery for personal injuries, even though most of the illegal acts defined as "racketeering activity" directly threaten or inflict personal injury. The limitation to "business or property" injury would be inexplicable if Congress intended to create a remedy for injuries inflicted on the immediate victims of the predicate crimes rather than simply for the competing businessman who otherwise has no remedy at all.

B. The Separation Of RICO From The Antitrust Laws Was Not Intended To Alter The Type Of Competitive Injury Necessary For Recovery.

The decision to include the treble damage remedy in RICO rather than in the antitrust laws does not mean, as some have argued, that Congress meant to cover more than "competitive injury." Senator Hruska's bill (S. 1623) was, as he explained when introducing it, a "synthesis" of two bills he had introduced in the prior Congress, S. 2048, 90th Cong., 1st Sess. (1967) and S. 2049, 90th Cong., 1st Sess. (1967). 115 Cong. Rec. 6993 (1969). Those earlier bills had proposed anti-racketeering amendments to the Sherman Act. Senator Hruska had explained that, under those proposals, "the evil to be curbed is the unfair competitive advantage" available to organized crime in its incursions into legitimate business. 113 Cong. Rec. 17,999 (1967). The repeated references in the legislative history to "unfair competition" are significant, because the concept of unfair competition had evolved to protect not simply competition at large but also an individual entrepreneur's property and business opportunity. *See generally* Prosser & Keeton, *supra*, § 130 at 1005-08, 1013-15.

The Antitrust Section of the American Bar Association endorsed that objective, agreeing that existing antitrust law might not redress the type of injury for which Senator Hruska's proposal was designed, if the "extortion tactics" affected "only the victimized business" but did not also cause a "lessening of competition in an entire line of commerce." Senate Hearings 557. The Antitrust Section, however, cautioned against inserting anti-racketeering legislation in the antitrust laws. That approach, the Section noted, would cause an undesirable "commingling of criminal enforcement goals with the goals of regulating competition" and could lead courts to superimpose the entire antitrust "body of precedent." Senate Hearings 557, 558.

When Senator Hruska introduced the "synthesis" of his earlier bills as S. 1623, he explained that his objective

was still to create a remedy for the "honest businessman who has been damaged by unfair competition" from racketeer infiltration, but he agreed that the remedy belonged "in a separate statute rather than within the existing framework of the Sherman Act. . . . " 115 Cong. Rec. 6993 (1969). Congress eventually agreed. The original goal, however, remained unchanged: to create a new private remedy to redress injury caused by "unfair competition" from racketeer-infiltrated businesses.

Thus, the civil RICO remedy, in contrast to treble damage actions under the antitrust laws, was intended to protect competitors, not just competition, but it was not intended to do more. Congress, of course, could decide that it wants to create private causes of action for all victims of federal criminal statutes, including the predicates listed in RICO, but that assuredly is not what Congress intended to do in 1970 — and had not even been asked to do — when it added the private civil remedy as, in Senator McClellan's words, a "minor change" in the organized crime control bill. 116 Cong. Rec. 36,293 (1970).

CONCLUSION

The judgment affirming the dismissal of the civil RICO claims should be affirmed.

Respectfully submitted.

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March 1985.

APPENDICES

APPENDIX A
A Partial Roster Of RICO Defendants

A partial roster of defendants in private RICO suits includes the following established and respected entities that private claimants have charged with engaging in a "pattern of racketeering":

Investment bankers and brokers

Bache Halsey Stuart Shields, Inc.
Bear Sterns & Co.
Dean Witter Reynolds
E.F. Hutton & Co.
Lehman Brothers Kuhn Loeb, Inc.
Loeb Rhodes & Co., Inc.
Merrill Lynch, Pierce Fenner & Smith, Inc.
Morgan Stanley & Co., Inc.
Oppenheimer & Co.
Paine Webber Jackson & Curtis, Inc.
Shearson/American Express, Inc.
Thomson McKinnon Securities, Inc.

National C.P.A. Firms

Alexander Grant & Company
Arthur Andersen & Co.
Coopers & Lybrand
Ernst & Whinney
Laventhol & Horwath
Peat Marwick Mitchell & Co.
Price Waterhouse
Touche Ross & Co.

Law Firms

Lord, Bissel & Brook
Pierson, Ball & Dowd
Singer, Hutner, Levine & Seemans
Sullivan & Wooster

Banks

Citibank, N.A.
Continental Illinois National Bank & Trust Co.
Crocker National Bank
First American Bankshares, Inc.
First Interstate Bank of Oregon
First National Bank of Atlanta
First National Bank of Maryland
Marine National Bank (Wisconsin)
National Republic Bank of Chicago
Pacific Western Bank
Riggs National Bank of Washington, D.C.
Sierra Federal Savings & Loan Association
Southwest National Bank
State Bank of India
Union Bank

Insurance Companies

Allstate Insurance Co.
Lincoln Insurance Co.
Prudential Insurance Co. of America
State Farm Mutual Automobile Insurance Co.
Travelers Insurance Co.
Underwriters of Lloyd's, London
USLIFE Corp.

Manufacturing Companies

A.H. Robins Co., Inc.
Boeing Co.
Continental Group, Inc.
General Dynamics Corp.
General Motors Corp.
Miller Brewing Co.
Mitsui & Co. (U.S.A.), Inc.
Rockwell International Corp.
Rohm & Haas Co.

APPENDIX B
S. 1623, As Introduced By Senator Hruska

S. 1623

MARCH 20, 1969 [MR. HRUSKA]

A BILL

To amend title 18 of the United States Code to prohibit the investment of certain income in any business enterprise affecting interstate or foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Activities Profits Act".

DEFINITIONS

SEC. 1. As used in this Act—

(1) The term "criminal activity" means (A) any act involving murder, kidnaping, extortion, bankruptcy fraud, or the manufacture, importation, receiving, concealment, buying, or otherwise dealing in narcotic drugs or marihuana which is punishable under any statute of the United States; (B) any act which is punishable under any of the following provisions of title 18, United States Code: section 201

(relating to bribery), section 224 (relating to sports bribery), sections 891-894 (relating to extortionate credit transactions), sections 471, 472, and 473 (relating to counterfeiting), section 1084 (relating to the transmission of gambling information), section 1503 (relating to obstruction of justice), section 1952 (relating to racketeering), section 1954 (relating to welfare fund bribery), and chapter 117 (relating to white slave traffic); and (C) any conspiracy to commit any of the foregoing offenses.

(2) The term "interstate commerce" means commerce within the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or between any place in a State and any place in another State, or between places in the same State through another State.

(3) The term "foreign commerce" means commerce between any State and any foreign country.

(4) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and American Samoa.

(5) The term "person" means any individual, and any partnership, corporation, association, or other legal entity.

(6) The term "income" means any income which is required by the Internal Revenue Code of 1954 to be reported as such for purposes of income taxation.

(7) The term "intentionally unreported income" means any income of any person which is subject to income taxation under the provisions of the Internal Revenue Code of 1954, but which with intent to evade the requirements of such code is not reported by such person as income within the time prescribed by such code.

PROHIBITION

SEC. 2. (a) Whoever, being a person who has received any income derived directly or indirectly from any criminal activity in which such person has participated as a principal within the meaning of section 2, title 18, United States Code applies any part of such income or the proceeds of any such income to the acquisition by or on behalf of such person of legal title to or any beneficial interest in any of the assets, liabilities, or capital of any business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce shall be guilty of a felony and shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

(b) Whoever, being a director, officer, or agent of a corporation who has authorized, ordered, or performed any act which constitutes in whole or in part a violation of subsection (a) by such corporation, shall be guilty of a misdemeanor and shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(c) Whoever (1) invests directly or indirectly any intentionally unreported income derived by such person from a proprietary interest in any business enterprise in any pecuniary interest in any other business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, or (2) uses any such income to establish or operate any such other business enterprise, shall be fined not more than $10,000, or imprisoned for not more than ten years, or both.

INJUNCTIONS

SEC. 3. (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 2.

(b) Under the direction of the Attorney General, it shall be the duty of United States attorneys, in their respective districts, to institute proceedings to prevent and restrain such violations. In any action by the United States under this section, the court shall proceed as soon as may be to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such temporary restraining order or prohibition as it shall deem proper.

(c) Any person (other than the United States) may institute action under this section, in any district court of the United States having jurisdiction over the parties, to prevent and restrain threatened loss or damage to such person from a violation of section 2. In any such action, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of irreparable loss or damage, a preliminary injunction may be issued in any such action before a determination thereof upon its merits.

ACTIONS FOR DAMAGES

SEC. 4. (a) Any person who is injured in his business or property by reason of any violation of section 2 may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

(b) Whenever the United States is injured in its business or property by reason of any violation of section 2, it may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual amount of the damages sustained, and the cost of the action.

(c) Except as otherwise provided by section 5, any action under this section shall be barred unless it is commenced within four years after the cause of action accrued.

EFFECT OF JUDGMENTS

SEC. 5. (a) A final judgment or decree entered in any civil or criminal proceeding instituted by the United States under this Act to the effect that a defendant has violated section 2 of this Act shall be prima facie evidence against such defendant, in any action brought by any other party against such defendant under this Act, as to all matters with respect to which such judgment or decree would be an estoppel as between the parties thereto. This subsection shall not apply to any consent judgment or decree entered before any testimony has been taken, or to any judgment or decree entered in an action under section 4(b).

(b) Whenever any civil or criminal action (other than an action under section 4(b)) is instituted by the United States to prevent, restrain, or punish any violation of section 2, the running of the period of limitations prescribed by section 4(c) with respect to any private right of action arising under this Act which is based in whole or in part on any matter complained of in such action by the United States shall be suspended during the pendency of such action by the United States and for one year thereafter. Whenever the running of such period of limitations is so suspended with respect to any right of action arising under section 4(a), action thereon shall be barred unless it is commenced within such period of suspension or within four years after the accrual of the cause of action.

VENUE AND PROCESS

SEC. 6. (a) Except as otherwise specifically provided by this Act, any civil or criminal action or proceeding under this Act against any person may be instituted in the district court of the United States for any district in which such person resides, is found, or has an agent, and any such action or proceeding against a corporation also may be instituted in such court for any district in which such corporation transacts business.

(b) In any action under section 3(b) of this Act in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this Act in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing a good cause.

(d) Except as otherwise specifically provided by this Act, all process in any action or proceeding under this Act against a corporation may be served in any judicial district in which such corporation is an inhabitant or is found.

EXPEDITION OF ACTIONS

SEC. 7. In any civil action instituted by the United States in any district court of the United States under this Act, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge (or in his absence to the presiding circuit judge) of the circuit in which such action is pending. Upon receipt of such copy, such judge shall designate immediately three judges of that circuit (of whom at least one shall be a circuit judge) to hear and determine such action. The judges so designated shall assign such action for hearing at the earliest practicable date, participate in the hearing and determination thereof, and cause such action to be expedited in every way.

EVIDENCE

SEC. 8. (a) In the taking of depositions for use in any civil action instituted by the United States under this Act and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court, and no order excluding the public from attendance at any such proceeding shall be made or enforced.

(b) No individual who gives testimony under oath, or produces documentary evidence under oath, in obedience to a subpena issued in any action or proceeding instituted by the United States under this Act may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies, or produces documentary or other evidence, in such action, except that no such individual shall be exempt from

prosecution or punishment for perjury committed while so testifying.

APPEALS

SEC. 9. In every civil action instituted by the United States in any district court of the United States under this Act, an appeal from the final judgment of the district court will lie only to the Supreme Court.

APPENDIX C
Title IX Of S.30, As Reported Out Of The Senate Judiciary Committee

Calendar No. 612

91st CONGRESS
1st SESSION

S. 30

[Report No. 91-617]

IN THE SENATE OF THE UNITED STATES

JANUARY 15 (legislative day, JANUARY 10), 1969

Mr. McClellan (for himself, Mr. Ervin, and Mr. Hruska) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

DECEMBER 18 (legislative day, DECEMBER 16), 1969

Reported by Mr. McClellan, with an amendment.

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

Relating to the control of organized crime in the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * * That this Act may be cited as the "Organized Crime Control Act of 1969."*

STATEMENT OF FINDINGS AND PURPOSE

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

* * *

TITLE IX—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

SEC. 901. (a) Title 18, United States Code, is amended by adding immediately after chapter 95 thereof the following new chapter:

"Chapter 96.—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

"Sec.
"1961. Definitions.
"1962. Prohibited racketeering activities.
"1963. Criminal penalties.
"1964. Civil remedies.
"1965. Venue and process.
"1966. Expedition of actions.
"1967. Evidence.
"1968. Civil investigative demand.

"§1961. Definitions.

"As used in this chapter—

"(1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472,

and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment), section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

"(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof;

"(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

"(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

"(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter;

"(6) 'unlawful debt' means a debt (A) which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to gambling or usury, and (B) which was incurred in connection with the business of gambling or the business of lending money or a thing of value at a usurious rate, where the usurious rate is at least twice the permitted rate;

"(7) 'racketeering investigator' means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

"(8) 'racketeering investigation' means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

"(9) 'documentary material' includes any book, paper, document, record, recording, or other material; and

"(10) 'Attorney General' includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

"§ 1962. Prohibited activities

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

"(e) A violation of this section shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation.

"§ 1963. Criminal penalties

"(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

"(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or

prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

"(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

"§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to,

prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

"(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

"(c) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

"§1965. Venue and process

"(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

"(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

"(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

"(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

"§1966. Expedition of actions

"In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine such action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

"§ 1967. Evidence

"In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings shall be open to the public, and no order closing any such proceeding shall be made or enforced.

"§ 1968. Civil investigative demand

"(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary material relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

"(b) Each such demand shall—

"(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

"(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

"(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(4) identify the custodian to whom such material shall be made available.

"(c) No such demand shall—

"(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

"(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

"(d) Service of any such demand or any petition filed under this section may be made upon a person by—

"(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

"(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

"(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

"(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

"(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

"(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for

examination by the person who produced such material or any duly authorized representatives of such person.

"(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

"(5) Upon the completion of—

"(i) the racketeering investigation for which any documentary material was produced under this chapter, and

"(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

"(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted

within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

"(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

"(i) designate another racketeering investigator to serve as custodian thereof, and

"(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

"(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such

district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

"(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

"(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

"(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section."

(b) The table of contents of part I, title 18, United States Code, is amended by adding immediately after

"95. Racketeering _____ 1951"

the following new item:

"96. Racketeer Influenced and Corrupt Organizations _____ 1961"

SEC. *902. (a) Paragraph (c), subsection (1), section 2516, title 18, United States Code, is amended by inserting at the end thereof between the parenthesis and the semicolon ", section 1963 (violations with respect to racketeer influenced and corrupt organizations)".*

(b) Subsection (3), section 2517, title 18, United States Code, is amended by striking "criminal proceedings in any court of the United States or of any State or in any Federal or State grand jury proceeding" and inserting in lieu thereof "proceeding held under the authority of the United States or of any State or political subdivision thereof".

SEC. *903. The third paragraph, section 1505, title 18, United States Code, is amended by inserting "or section 1968 of this title" after "Act" and before "willfully".*

SEC. *904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.*

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalities or affording civil remedies in addition to those provided for in this title.

(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to—

(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketering violation of law;

(2) invoke the power of any such court to compel the production of any evidence before any such grand jury; or

(3) institute any proceeding to enforce any order or process issued in execution of such power or to punish disobedience of any such order or process by any person.

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